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Supreme Court, U.S.
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No. A-697

EDWARD CHARLES PICKENS, PETITIONER,

V.

STATE OF ARKANSAS, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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1. THE DUE PROCESS CLAUSE PROTECTS ANY ACCUSED AGAINST CONVICTION EXCEPT UPON EVIDENCE SUFFICIENT TO SUPPORT THE CONCLUSION THAT EVERY ELEMENT OF THE CRIME CHARGED HAS BEEN ESTABLISHED BEYOND A REASONABLE DOUBT; AND

2. ON APPEAL PETITIONER WAS ENTITLED TO HAVE THE VALIDITY OF HIS CONVICTION AND SENTENCE APPRAISED ON CONSIDERATION OF HOW THE ISSUES WERE DETERMINED IN THE TRIAL COURT; AND

3. AN ESSENTIAL ELEMENT OF THE CRIME FOR WHICH PETITIONER WAS CONVICTED AND SENTENCED TO DEATH, MURDER IN THE FURTHERANCE OF A ROBBERY, WAS THAT A ROBBERY WAS ATTEMPTED OR COMMITTED; AND

4. THE JURY RETURNED A GENERAL VERDICT OF GUILTY OF THE CRIME CHARGED BUT AN INCONSISTENT SPECIAL VERDICT THAT THE MURDER WAS NOT COMMITTED FOR "PECUNIARY GAIN", A PHRASE INTERPRETED BY THE ARKANSAS SUPREME COURT TO MEAN IN THE PERPETRATION OR ATTEMPTED PERPETRATION OF A ROBBERY. 9

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. A-697

EDWARD CHARLES PICKENS, PETITIONER,

V.

STATE OF ARKANSAS, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

The petitioner, Edward Charles Pickens, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceeding on November 3, 1980.

OPINION BELOW

The opinion of the Supreme Court of Arkansas was unpublished and thus is an unreported opinion. A copy of the opinion appears in Appendix A.

JURISDICTION

The initial opinion of the Supreme Court of Arkansas, affirming petitioner's conviction and sentence, was filed on June 6, 1977. Petition for writ of certiorari to the Supreme Court of Arkansas was denied by this Court on February 27, 1978. Petitioner subsequently sought permission from the Supreme Court of Arkansas to seek post-conviction relief in the trial court and to obtain a transcript of the jury selection proceedings. Petitioner sought permission to seek post-conviction review of his constitutional contentions that he was denied rights secured to him by the Fifth, Sixth, Eighth, and Fourteenth Amendments. In an unpublished opinion delivered November 3, 1980, permission to seek review in the trial court was denied. A timely petition

for rehearing was denied on December 4, 1980. An application for order extending the time for filing this petition for writ of certiorari was filed on February 2, 1981, and an extension granted until March 4, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3), petitioner asserting here and having asserted below a deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether petitioner's conviction and sentence are void under the Due Process Clause due to a failure to establish every element of the crime charged where an essential element to be proved beyond a reasonable doubt is that the murder was committed during the perpetration of a robbery, or for pecuniary gain, and the jury returned a special verdict that the murder was not committed for pecuniary gain, or in the furtherance of a robbery.

2. Whether petitioner was denied his right under the Eighth and Fourteenth Amendments to meaningful and responsible review of his conviction and sentence to insure that the sentence of death was not arbitrarily or capriciously imposed by the failure of the Supreme Court of Arkansas to meaningfully review petitioner's consititutional contentions at any stage of the appellate process, despite its mandatory statutory duty to review all errors prejudicial to the rights of the petitioner.

CONSTITUTIONAL AND STATUORY PROVISIONS

This case involves the following constitutional and statutory provisions (quoted in relevant part only).

1. The Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. Act 438 of 1973, sections two, ten, eleven and thirteen, codified as Ark. Stat. Ann. §§41-4702 and 41-4710, et seq. (Supp. 1973), repealed as of January 1, 1976.

§41-4702. Capital felonies - Definitions. - The following crimes shall be capital felonies punishable as provided in

Section 6 [§41-4706] hereof:

(A) the unlawful killing of a human being when committed by a person engaged in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, kidnapping, or mass transit piracy;

§41-4710. Trial Procedure - Verdict in writing. - A person charged with a capital felony shall be given a jury trial and sentenced pursuant to the following procedure:

(a) After presententation of all evidence and witnesses to be offered by the State and/or the defendant as to the guilt or innocence of the defendant, instructions to the jury, and argument by counsel, the jury shall retire and consider the case.

(b) If the jury finds the defendant guilty of a capital felony, the same jury shall sit again to determine whether the defendant shall be sentenced to death or life imprisonment without parole.

(c) In the proceeding to determine sentence, evidence may be presented as to any matters relevant to sentence and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 11 [§41-4711] and 12 [§41-4712] of this act. The State and the defendant or his counsel shall be permitted to present argument for or against the sentence of death.

(d) After hearing all the evidence as to sentence, the jury shall again retire and render a sentence based upon the following:

(i) whether beyond a reasonable doubt sufficient aggravating circumstances, as enumerated in Section 11 [§41-4711] of this act, exist to justify a sentence of death;

(ii) whether sufficient mitigating circumstances as enumerated in Section 12 [§41-4712] of this act exist to justify a sentence of life imprisonment without parole.

(e) The jury in rendering its verdict shall set forth in writing its findings as to each of the aggravating or mitigating circumstances enumerated in Sections 11 [§41-4711] and

12 [§41-4712] hereof and shall set forth in writing its conclusion:

(i) That sufficient aggravating circumstances (do or do not) exist beyond a reasonable doubt to justify a sentence of death;

(ii) that there are (or are not) sufficient mitigating circumstances to outweigh the aggravating circumstances.

(f) If the jury does not make the findings requiring the death sentence by unanimous verdict, the court shall impose sentence of life imprisonment without parole.

§41-4711. Aggravating circumstances. - Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment;

(b) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

(c) the defendant in the commission of the capital felony knowingly created a great risk of death to one (1) or more persons in addition to the victim;

(d) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(e) the capital felony was committed for pecuniary gain; and

(f) the capital felony was committed for the purpose of disrupting or hindering the lawful exercise of any governmental function, political function or the enforcement of laws.

§41-4713. Review. - Nothing herein shall be construed to limit the powers of the Supreme Court to review and reverse the finding of guilt for error of law, prejudice, insufficient evidence, or any other reason now permitted on review of convictions and sentences to life imprisonment.

3. Act 333 of 1971, Section eleven, codified as Ark. Stat. Ann. §43-2725 (Repl. 1977).

§43-2725. Matters to be considered on appeal. - The Supreme court need only to review those matters briefed and argued by the appellant provided that where either a sentence for life imprisonment or death, the Supreme Court shall review all errors prejudicial to the rights of the appellant.

4. Arkansas Rules of Criminal Procedure, Rule 36.24 (Repl. 1977), set out in Volume 4A of the Arkansas statutes.

Rule 36.24. Matters to Be Considered on Appeal. - The Supreme court need only review those matters briefed and argued by the appellant provided that where either a sentence for life imprisonment or death was imposed, the Supreme Court shall review the entire record for errors prejudicial to the right of the appellant.

5. Arkansas Rules of Criminal Procedure, Rule 37.1(a) (Repl. 1977).

Rule 37.1(a). Scope of Remedy.

A prisoner, in custody under sentence of a circuit court and whose case was not appealed to the Supreme Court, claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:

(a) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or...

6. Arkansas Rules of Criminal Procedure, Rule 37.2 (Repl. 1977).

Rule 37.2 Commencement of Proceedings; Pleadings; Permission of Supreme Court Following Appeal.

(a) If the conviction in the original case was appealed to the Supreme Court, then no proceedings under this rule shall be entertained by the circuit court without prior permission of the Supreme Court.

(b) All grounds for relief available to a prisoner under this rule must be raised in his original or amended petition.

Any grounds not so raised or any grounds finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence or in any other proceedings that the prisoner may have taken to secure relief from his conviction or sentence may not be the basis for a subsequent petition.

STATEMENT OF THE CASE

Petitioner Edward Charles Pickens was charged by amended information filed December 20, 1975, with capital murder in violation of Ark. Stat. Ann. §41-4702 (Supp. 1973). The information alleged petitioner unlawfully and feloniously murdered Wesley Noble during the perpetration of a robbery.

Trial by jury ensued on February 4, 1976, petitioner being represented by court-appointed counsel and over petitioner's objections, the State was represented by the district's prosecuting attorney and two additional special prosecutors. After a hearing, evidence seized upon petitioner's arrest as well as a confession and lineup identification were ruled admissible at trial. Trial by jury concluded on February 5, 1976, the jury finding petitioner guilty as charged and sentencing him to death by electrocution.

The evidence presented by the State established that on the afternoon of October 20, 1975, petitioner and two others held up Cloud's Grocery store in Casscoe, Arkansas. During the course of the robbery, numerous persons were shot and Wes Nobles, a customer in the store, was killed. There was conflicting testimony with regard to which of the three men actually fired the murder weapon. There was no direct evidence establishing who actually fired the fatal shots. At the sentencing phase of the trial, the jury, after deliberation, unanimously found three aggravating circumstances to exist beyond a reasonable doubt. The jury also found that the capital felony was not committed for pecuniary gain. Counsel presented no evidence in mitigation and no mitigating circumstances were determined by the jury to exist.

After the trial, the court reporter's tapes of the trial were

destroyed in a fire. Petitioner's trial counsel moved for a new trial on the ground that the record, as reconstructed from the court reporter's shorthand notes, failed to present a complete and accurate record and thereby deprived petitioner of his absolute right to have the entire record and all errors appearing therein reviewed by the state supreme court. The motion was denied by the trial court. On appeal, petitioner's conviction and sentence were affirmed, the Supreme Court of Arkansas rejecting all of petitioner's contentions including the assertion that the sentence of death was arbitrarily and freakishly imposed. Pickens v. State, 261 Ark. 756, 551 S.W.2d 212 (1977), cert. denied, 435 U.S. 909 (1977).

Subsequently, through present counsel, petitioner sought permission to seek post-conviction relief of his constitutional contentions that: (1) his conviction and sentence were void under the Due Process Clause and the laws of the State of Arkansas due to the inconsistency between the jury's general verdict of guilt and its special finding which negated an essential element of the crime charged; (2) he was denied rights secured to him by the Fifth, Sixth, and Fourteenth Amendments by the wrongful exclusion from the jury of prospective jurors in violation of the rule laid down in Witherspoon v. Illinois, 391 U.S. 510 (1968); and (3) he was denied his Sixth Amendment right to the effective assistance of counsel at trial and on appeal. Permission to seek review of these contentions was denied by the Supreme Court of Arkansas. On rehearing, petitioner asserted he was denied his right under the Eighth and Fourteenth Amendments and the laws of Arkansas to full and meaningful appellate review of his conviction and sentence. Petition for rehearing was denied on December 4, 1980, without opinion.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner's questions arise from his contentions in the Arkansas Supreme Court that the application of the Arkansas death penalty statute denied him rights secured by the Fifth, Sixth,

Eighth, and Fourteenth Amendments. These contentions were summarily rejected by the Supreme Court of Arkansas.

REASONS FOR GRANTING THE WRIT

A.

PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE AFFIRMANCE OF HIS CONVICTION AND SENTENCE OF DEATH WHERE THE JURY MADE TOTALLY INCONSISTENT FINDINGS WITH REGARD TO AN ESSENTIAL ELEMENT OF THE CRIME CHARGED BECAUSE:

1. THE DUE PROCESS CLAUSE PROTECTS AN ACCUSED AGAINST CONVICTION EXCEPT UPON EVIDENCE SUFFICIENT TO SUPPORT THE CONCLUSION THAT EVERY ELEMENT OF THE CRIME CHARGED HAS BEEN ESTABLISHED BEYOND A REASONABLE DOUBT; AND

2. ON APPEAL PETITIONER WAS ENTITLED TO HAVE THE VALIDITY OF HIS CONVICTION AND SENTENCE APPRAISED ON CONSIDERATION OF HOW THE ISSUES WERE DETERMINED IN THE TRIAL COURT; AND

3. AN ESSENTIAL ELEMENT OF THE CRIME FOR WHICH PETITIONER WAS CONVICTED AND SENTENCED TO DEATH, MURDER IN THE FURTHERANCE OF A ROBBERY, WAS THAT A ROBBERY WAS ATTEMPTED OR COMMITTED; AND

4. THE JURY RETURNED A GENERAL VERDICT OF GUILTY OF THE CRIME CHARGED BUT AN INCONSISTENT SPECIAL VERDICT THAT THE MURDER WAS NOT COMMITTED FOR "PECUNIARY GAIN", A PHRASE INTERPRETED BY THE ARKANSAS SUPREME COURT TO MEAN IN THE PERPETRATION OR ATTEMPTED PERPETRATION OF A ROBBERY.

Petitioner Edward Charles Pickens was charged by information with capital felony murder in violation of Ark. Stat. Ann. §41-4702(A) (Supp. 1973), the information alleging that petitioner did murder one Wesley Noble during the perpetration of a robbery. (T. 27, 28) At the close of the evidence, the trial court instructed the jury on the presumption of innocence and the state's burden of proving guilt beyond a reasonable doubt. (T. 226) With regard to the specific offense charged, the jury was instructed as follows:

STATE'S INSTRUCTION NO. 2

> Capital murder is defined by the Arkansas law as the unlawful killing of a human being when committed by a person engaged in the perpetration, or in the attempt to perpetrate the crime of robbery. The manner of the killing is not material further than it may show the disposition of mind or the intent with which the act was committed.

STATE'S INSTRUCTION NO. 2A

> Robbery is defined by Arkansas law as the felonious and violent taking of any goods, money or other valuable thing from the person of another by force or intimidation. The manner of the force or mode of intimidation is not material further than it may show the intent of the defendant. (T. 227)

After deliberation, the jury found petitioner guilty of capital murder as charged in the information. (T. 42)

The jury was then instructed with regard to sentencing form A, which lists the aggravating circumstances set out in Ark. Stat. Ann. §41-4711 (Supp. 1973), and that its findings on aggravating circumstances must be unanimous and beyond a reasonable doubt. The jury was directed to check, in the appropriate place on the form, whether each aggravating circumstance existed. (T. 238, 239) After further deliberation, the jury returned with its designated findings of fact. The jury found three of the aggravating circumstances to exist beyond a reasonable doubt: (1) the defendant beyond a reasonable doubt had previously been convicted of a felony involving the use or threat of violence; (2) the defendant beyond a reasonable doubt created a great risk of death to one or more persons in addition to the victim; and (3) the capital felony murder was beyond a reasonable doubt committed for the purpose of avoiding a lawful arrest. The jury concluded that the capital felony murder was not committed for pecuniary gain. (T. 43, 44)

According to the jury instructions and under Arkansas law, an essential element of the crime of which petitioner was convicted is that a robbery was attempted or committed. Ark. Stat. Ann. §41-4702(A) (Supp. 1973). The Due Process Clause protects a defendant against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). Absent proof that a robbery was attempted or committed, petitioner's conviction of capital murder cannot stand. Bly v. State, 263 Ark. 138, 562 S.W.2d 605 (1978). On appeal, a reviewing court, after reviewing the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). However, petitioner on appeal was entitled under the Due Process Clause to have the validity of his conviction, including the sufficiency of the evidence, appraised on consideration of the case as is was tried, and as the issues were determined in the trial court. Presnell v. Georgia, 439 U.S. 14 (1978) and Cole v. Arkansas, 333 U.S. 196 (1948). In light of these principles, petitioner's conviction and sentence of death for murder in the furtherance of a robbery cannot stand due to the jury's special finding or determination that the murder was not for pecuniary gain, or in the furtherance of the commission or attempted commission of robbery.

It is firmly established that where there is an inconsistency between a general verdict and a special verdict or finding, the latter is controlling. Pipefitters Local Untion No. 562, et al. v. United States, 407 U.S. 385 (1972); Wesley v. State, 265 Ark. 406, 578 S.W.2d 895 (1979); and Bly v. State, supra. Here the jury's special finding that the murder was not committed for pecuniary gain is inconsistent with its general verdict of guilt of the crime charged and negates an essential element of the crime which the jury had to find beyond a reasonable doubt, thereby rendering the conviction void. Id.

The Supreme Court of Arkansas has characterized the aggravating circumstance that the offense was committed for pecuniary gain as a phrase "of such common understanding and practice that it cannot be said an ordinary man or juror would have to speculate as to its meaning." Neal v. State, 259 Ark. 27, 32, 531 S.W.2d 17 (1975), vacated on other grounds, 429 U.S. 966 (1976). (Court's emphasis). In that case as well as by common understanding and repeated judicial pronouncement, that phrase has been interpreted to mean that the murder was committed in the perpetration or attempted perpetration of a robbery. See, e.g. Neal v. State, 261 Ark. 336, 548 S.W.2d 135 (1977), cert. denied, 434 U.S. 878 (1978); Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977), cert. denied, 434 U.S. 878; Giles v. State, 261 Ark.

413, 549 S.W.2d 479 (1977), cert. denied, 434 U.S. 894; Hulsey v. State, 261 Ark. 449, 549 S.W.2d 73 (1977), cert. denied, 439 U.S. 882 (1978); Ruiz & Van Denton v. State, 265 Ark. 875, 582 S.W.2d 915 (1979); Woodard v. State, 261 Ark. 895, 553 S.W.2d 259 (1977), cert. denied, 439 U.S. 1112 (1979); Miller v. State, 270 Ark. 341, ____ S.W.2d ____ (June 23, 1980), petition for cert. docketed, No. 80-5969 (December 23, 1980).

In the instant case, the state's opening statements, the testimony of state's witnesses, the state's closing arguments, and the trial court's instructions all informed the jury that the basis for the capital murder charge against petitioner was that he unlawfully killed another human being while engaged in perpetration of or the attempt to perpetrate a robbery. The jury's determination of guilt or innocence was necessarily restricted to the determination of whether the state had proved beyond a reasonable doubt that petitioner did in fact kill Wes Nobles for pecuniary gain, or in the perpetration or attempted perpetration of a robbery. The jury found appellant guilty as charged and pursuant to the trial court's instructions.

The jury's finding that petitioner killed Wes Nobles in the perpetration of a robbery at the guilt stage of the trial is inconsistent with their finding on aggravating circumstances at the sentencing phase. The jury there found that the murder was not committed for pecuniary gain or, in other words, in the perpetration or attempted perpetration of a robbery. The validity of petitioner's conviction and sentence can only be appraised on consideration of the case as it was tried, and the issues determined in the trial court are conclusive. Presnell v. Georgia, supra; Cole v. Arkansas, supra; and Bly v. State, supra.

The jury's findings are inconsistent and ambiguous. Since penal statutes must be strictly construed with all doubts resolved in favor of the defendant, any inconsistency or ambiguity in the jury's findings must be resolved in petitioner's favor. State v. Scarmardo, 263 Ark. 396, 565 S.W.2d 414 (1978), and Breakfield v. State, 263 Ark. 398, 566 S.W.2d 729 (1978).

Certainly, in a case involving imposition of a sentence of death, inconsistencies in a jury's findings at the guilt phase of the trial and at the sentencing phase cannot be resolved on the basis of speculation or conjecture. If the murder was not committed for pecuniary gain, it cannot constitute murder in the furtherance of a robbery, or capital murder, and reversal is mandated, Pipefitters Local Union No. 562 v. United States, supra; Wesley v. State, supra; and Bly v. State, supra.

Although not raised on direct appeal, due to the ineffectiveness of counsel, this error is apparent on the face of the record. By statute, Ark. Stat. Ann. §43-2725 (Repl. 1977), and rule, Ark. Rules Crim. Pro., Rule 36.24 (Repl. 1977), the Arkansas Supreme Court has a mandatory duty to independently review the entire record for any errors prejudicial to the rights of the defendant. As explained in Collins v. State, supra, this statutorily mandated review requires an examination of the entire trial record, "even though the objectionable action which might be reversible error was not argued on appeal in any way." 261 Ark. at 216. The omission of counsel, in these circumstances, did not absolve the appellate court of its duty to independently review the record for error. See, Gardner v. Florida, 430 U.S. 349 (1977). The issue was clearly raised by petitioner in his petition for post-conviction relief, but the Supreme Court of Arkansas declined to review it. As will be discussed below, the court's refusal to review this issue was based upon an unprecedented and ad hoc procedural rule, not heretofore applied, and is inadequate to bar review of the issue by this Court. Wright v. Georgia, 373, U.S. 284 (1963) and Douglas v. Alabama, 380 U.S. 415 (1965). The failure of the Supreme Court of Arkansas to engage in the mandated meaningful appellate review of petitioner's conviction and sentence resulted in the affirmance of a death sentence imposed upon a void conviction.

B.

THE ARKANSAS SUPREME COURT'S FAILURE TO REVIEW CONSTITUTIONAL ERROR IN THE RECORD DENIED PETITIONER EQUAL PROTECTION AND HIS RIGHT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO MEANINGFUL AND RESPONSIBLE REVIEW OF HIS CONVICTION AND SENTENCE TO ENSURE THAT THE SENTENCE OF DEATH IS NOT ARBITRARILY OR CAPRICIOUSLY IMPOSED.

In focusing upon the procedures by which convicted defendants are selected for the death penalty, this Court, in Furman v. Georgia, 408 U.S. 238 (1972), expressed great concern over the possibility of discrimination in the imposition of the sentence of death, the infrequency of its imposition, and the inherent problem of arbitrariness or capriciousness in the process by which a random handful of defendants are sentenced to death. In subsequent cases, this Court stated that the concerns expressed in Furman could be met, at least facially, by a carefully and narrowly drawn statute which provides sufficient standards to suitably direct and limit the jury's discretion so as to minimize the risk of wholly arbitrary and capricious jury action. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 262 (1976). However, it was emphasized in each of the cited cases that there is always a possibilty of arbitrariness or capriciousness in a jury's verdict, thereby necessitating the important additional safeguard of meaningful appellate review as a check against the arbitrary imposition of the death penalty. The review responsibilities of state appellate courts must be taken seriously and that function performed conscientiously. Godfrey v. Georgia, 446 U.S. ____, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Where that review function is not so performed, the goal of eliminating the concerns expressed in Furman is doomed to failure.

Despite the existence of facially constitutional statutes and provisions for state appellate review of death sentences, there remain increasingly grave problems with the constitutional appli-

cation of death penalty statutes and those problems are not being rectified by state appellate courts.[1] The "meaningfulness" of state appellate review can be and has been seriously questioned. Indeed, the frequency with which this Court has reversed decisions of state supreme courts wrongfully upholding the imposition of death sentences led Justices Marshall and Brennan to suggest that state appellate courts are incapable of quaranteeing the degree of objectivity and evenhandedness that was contemplated and hoped for in Gregg. Godfrey v. Georgia, supra, (Marshall J., concurring).

The case at bar presents a distressing but classic example of the failure of an appellate court not only to responsibly and conscientiously undertake its review responsibilities, but to even provide an equal opportunity to obtain review of asserted constitutional errors. The result is that by merely declining to even review the asserted errors, a sentence of death has been affirmed by the Supreme Court of Arkansas, despite the assertion of constitutional errors and despite the presence on the face of the record of inconsistent verdicts which render the conviction and sentence void.

Where a sentence of death or life imprisonment is imposed, the Arkansas Supreme Court, by statute, Ark. Stat. Ann. §43-2725 (Repl. 1977), and rule, Ark. Rules Crim. Pro., Rule 36.24 (Repl. 1977), has a mandatory duty to independently review the entire record for errors prejudicial to the rights of the appellant. Upon reconsideration of the Arkansas death penalty statute in light of the 1976 quintuplet offspring of Furman, the court in

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[1] See, e.g., Miller v. Arkansas, 270 Ark. 341, ____ S.W.2d ____ (1980), petition for cert. docketed, No. 80-5969 (Dec. 23, 1980); Adams v. Texas, ____ U.S. ____, 65 L.Ed.2d 581 (June 25, 1980); Beck v. Alabama, 447 U.S. ____, 65 L.Ed.2d 392 (1980); Godfrey v. Georgia, 446 U.S. ___, 64 L.Ed.2d 398 (1980); Green v. Georgia, 442 U.S. 95 (1979); Presnell v. Georgia, 439 U.S. 14 (1978); Bell v. Ohio, 438 U.S. 637 (1978); Lockett v. Ohio, 438 U.S. 586 (1978); Downs v. Ohio, 438 U.S. 909 (1978); Shelton v. Ohio, 438 U.S. 909 (1978); Woods v. Ohio, 438 U.S. 910 (1978); Roberts v. Ohio, 438 U.S. 910 (1978); Jordan v. Arizona, 438 U.S. 911 (1978); Coker v. Georgia, 433 U.S. 584 (1977); Eberhart v. Georgia, 433 U.S. 917 (1977); Hooks v. Georgia, 433 U.S. 917 (1977); Gardner v. Florida, 430 U.S. 349 (1977); Davis v. Georgia, 429 U.S. 122 (1976).

Collins v. State, 261 Ark. 195, 216, 548 S.W.2d 106 (1977), cert. denied, 434 U.S. 878 (1977) stressed the fact that there was meaningful appellate review in every case of the appropriateness of the death penalty, pointing out that the statutorily mandated review required examination of the entire trial record for error, even though the objectionable action which might be reversible error "was not argued on appeal in any way." (Emphasis supplied). Counsel's failure to raise an issue involving reversible error does not constitute an effective waiver of constitutional error appearing on the face of the record, Gardner v. Florida, 430 U.S. 349 (1977), and does not absolve the appellate court of its mandatory statutory duty to review the entire record for error. Whether the type of meaningful appellate review discussed in Collins v. State, supra, has any continuing viability in Arkansas has recently been a subject of doubt. Miller v. State, 270 Ark. 341, ___ S.W.2d ___ (October 6, 1980) (Fogelman, C. J., dissenting). Those doubts are confirmed by this case as the appellate court, having once failed in its independent review of the record on direct appeal to detect the reversible error in the inconsistent verdicts, has subsequently refused petitioner the right to even seek review of that asserted constitutional error, and others, in a collateral proceeding.

After his direct appeal, petitioner, pursuant to Ark. Rules Crim. Pro., Rule 37 (Repl. 1977), sought permission to seek post-conviction review of three constitutional contentions which were not raised on appeal by his trial and appellate counsel. Specifically, petitioner contended: (1) his conviction and sentence were void due to the inconsistency between the general and special verdicts which negated an essential element of the crime charged; (2) he was denied rights secured to him by the Fifth, Sixth, and Fourteenth Amendments by the wrongful exclusion from the jury of prospective jurors in violation of the rule laid down in Witherspoon v. Illinois, 391 U.S. 510 (1968); and (3) he was denied his right under the Sixth and Fourteenth Amendments to the effective assistance of counsel at trial and on appeal. Although

all three contentions constituted grounds for relief under Ark. Rules Crim. Pro., Rule 37.1(a) (Repl. 1977), the Supreme Court of Arkansas denied petitioner permission to seek review of them. On rehearing, petitioner asserted the court's denial of permission to obtain review of his constitutional contentions denied him the opportunity for the meaningful appellate review mandated by Arkansas statute, rule, and court decision as well as by the Eighth and Fourteenth Amendments.

Review of petitioner's contention that the inconsistent verdicts rendered his conviction void was denied because that issue had not been raised at trial or on direct appeal. (Appendix A, p. 2). That ruling does not comport with prior precedent in Arkansas nor with concepts of fundamental fairness. In the first place, the Supreme Court of Arkansas had a self-declared and mandatory statutory duty on direct appeal to review all errors on the record even though not argued in any way on appeal. Collins v. State, supra. The failure of counsel to raise this issue on appeal does not constitute a waiver of the constitutional error any more than does the failure of the Arkansas Supreme Court to fulfill its mandated review responsibilities. See, Gardner v. Florida, supra. The refusal of the court to grant permission to seek collateral review of this issue, simply because not raised on direct appeal, is fundamentally unfair in that it actually denied petitioner his right to meaningful review because of the ineffectiveness of his counsel and the ineffectiveness of the appellate court in not undertaking its mandated review responsibilities.

Further, because the inconsistent verdicts render petitioner's conviction void, Bly v. State, 263 Ark. 138, 562 S.W.2d 605 (1978) and Wesley v. State, 265 Ark. 406, 578 S.W.2d 895 (1979), the issue is one which can be raised for post-conviction relief even though not raised at trial or on appeal. Neal v. State, 270 Ark. 442, ___ S.W.2d ___ (September 29, 1980) and Hulsey v. State, 268 Ark. 312, 595 S.W.2d 934 (1980), cert. denied, No. 80-5204 (October 20, 1980). It is firmly established

in Arkansas that points raised and disposed of on direct appeal are not grounds that can be raised again in a petition for post-conviction relief. Neal v. State, supra, and Ark. Rules Crim. Pro., Rule 37.2(b) (Repl. 1977). However, the stated purpose and function of the Arkansas rule regarding post-conviction relief is to provide a means for determining whether any constitutional requirements or statutory enactments, federal or state, have been violated, or whether the sentence is otherwise subject to collateral attack. Thacker v. Urban, 246 Ark. 956, 440 S.W.2d 553 (1969). Thus, in Hulsey v. State, 261 Ark. 449, 549 S.W.2d 73 (1977), cert. denied, 439 U.S. 882 (1978), no issue was raised on direct appeal with regard to the wrongful exclusion of jurors in violation of the Witherspoon rule. Nevertheless, when that issue was raised for the first time in a petition for Rule 37 relief, the court deemed the allegation timely and proper, and reviewed it on the merits. Hulsey v. State, 268 Ark. 312, 595 S.W.2d 934 (1980), cert. denied, No. 80-5204 (October 20, 1980). There is no basis for the court's arbitrary and singular refusal to even review the issue raised in the instant case, which issue equally renders petitioner's conviction and sentence void as the issue in Hulsey would have.

Having established a post-conviction procedure, a state cannot, consistent with the Equal Protection Clause, arbitrarily deny access to that review procedure to one person while allowing access to another on similar claims. Long v. Iowa, 385 U.S. 290 (1966) and Smith v. Bennett, 365 U.S. 708 (1961). The stated purpose of the Arkansas rule on post-conviction relief, providing a means for asserting constitutional violations not disposed of on appeal, has been thwarted with regard to petitioner by the singular application of a newly announced procedural rule, not heretofore applied, which treats petitioner differently from others similarly circumstanced. See, e.g., Hulsey v. State, 268 Ark. 312, 595 S.W.2d 934 (1980), cert. denied, No. 80-5204 (October 20, (1980).

This Court has emphasized the need for and desirability of

the states providing their prisoners some adequate corrective process for the hearing and determination of claims of violations of federal constitutional guarantees. See, Case v. Nebraska, 381 U.S. 336 (1965). The method by which prisoners may raise claims of denials of federal rights must be clearly defined. Young v. Ragen, 337 U.S. 235 (1949). State procedures which fail to provide a genuine opportunity for testing constitutional issues in the state courts burden the federal judiciary and frustrate the criminal justice process. Case v. Nebraska, supra, (Clark, J., concurring). By virtue of Rule 37, the State of Arkansas has conferred upon its prisoners the right to assert the denial of federal rights in collateral procedings, and those proceedings, to be meaningful, should be sufficiently comprehensive to embrace all constitutional claims, particularly in a capital case when the appellate court has overlooked those errors in performing its mandated independent review of the entire trial record on direct appeal. When a state confers a right to raise constitutional issues in a collateral proceeding, the assertion of those issues, when plainly and reasonably made, should not be denied under the name of local practice, Wright v. Georgia, 373 U.S. 284 (1963), nor by the pointless and severe application of ad hoc procedural rules never consistently applied before. NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964). The adequacy of state procedural bars to the assertion of federal rights is itself a federal question. Douglas v. Alabama, 380 U.S. 415 (1965).

Petitioner's contention that his conviction and sentence were void due to the inconsistent verdicts constituted an assertion of a denial of both federal and state rights which, on the face of the applicable rule, Rule 37.1(a), and according to precedent, Thacker v. Urban, supra, and Hulsey v. State, supra, established a cognizable claim for post-conviction relief, warranting not only review but summary reversal of his conviction. In refusing to consider the asserted error, the Arkansas Supreme Court fashioned a new, ad hoc procedural rule which, in effect, negates any possibility of raising claims of the denial of constitutional

rights in a collateral proceeding, rendering post-conviction relief a virtual nullity in Arkansas. The court's ruling precludes post-conviction review of all issues raised and disposed of on direct appeal and all constitutional issues not raised on direct appeal. The court's opinion denying review effectively limits a defendant to one avenue of review, direct appeal, and compounds the problem of the court's failure to meaningfully review the entire record, as mandated by statute and rule, by denying petitioner access to the state courts for assertion and review of his constitutional contentions. The combination of the failure of the Supreme Court of Arkansas to fulfill its mandatory statutory duty to review the entire record for errors, even if not raised on appeal, Collins v. State, supra, and the pronouncement that it will not consider in a collateral proceeding errors not raised on appeal, or which it failed to discover in its independent review of the record, has resulted in the affirmance of a sentence of death despite the presence of constitutional error on the face of the record which renders the underlying conviction void.

Petitioner was similarly denied a meaningful opportunity to be heard on his contention that prospective jurors were improperly excluded under the Witherspoon rule. Although a sentence of death cannot be carried out if the jury imposing it was selected by excluding veniremen for cause simply because they voiced general objections to the death penalty, Witherspoon v. Illinois, supra, and Davis v. Georgia, 429 U.S. 122 (1976), the Supreme Court of Arkansas, despite its mandatory duty to review all possible errors, never even reviewed a transcript of the voir dire proceedings. The issue was not raised on direct appeal, but in other death penalty cases where the issue was not raised, the court, sua sponte, has ordered a supplemental transcript of the voir dire proceedings to fulfill its mandatory review responsibilities. Clark v. State, 264 Ark. 630, 573 S.W.2d 622 (1978). There is no apparent reason why this procedure was not followed in the instant case.

In his petition for collateral review, petitioner contended jurors were excused in violation of the Witherspoon rule, but this contention was not reviewed because no record evidence was pointed to in support of that allegation. Obviously, such error is impossible to demonstrate without a transcript, and petitioner requested that upon granting him permission to seek review of his contentions, that the trial court be ordered to prepare the required supplemental record.

Petitioner's attempts to obtain a transcript of the voir dire proceedings were as unsuccessful as his attempt to obtain review of his contentions. Initially, petitioner filed a pro se motion for a copy or use of his trial transcript to prepare his petition for post-conviction relief. That motion was denied, the court pointing out that such a motion was required to be attached to or incorporated into the actual petition for post-conviction relief. Pickens v. State, 266 Ark. 486, 586 S.W.2d 1 (1979). Present counsel subsequently filed a petition for writ of certiorari to have the record supplemented. The petition was filed pursuant to Arkansas Supreme Court Rule 26 [Ark. Stat. Ann. Vol. 3A (Repl. 1979)] and Ark. Rules Appellate Pro., Rule 6 [Ark. Stat. Ann. Vol. 3A (Repl. 1979)], and was the same procedure followed in other cases to obtain a supplemental transcript.

In the cases of Collins v. State, supra, and Woodard v. State, 268 Ark. 358, ___ S.W. ___ (April 14, 1980), petitions for writ of certiorari were filed to obtain transcripts of the jury selection proceedings for preparation of petitions for post-conviction review. In both cases the petitions were granted and a per curiam order entered which expressly vested the trial court with jurisdiction to entertain a motion for a supplemental transcript. Collins v. State, (unpublished per curiam) (November 19, 1979) and Woodard v. State, supra. This procedure was proper because absent an express grant of jurisdiction, a trial court has no jurisdiction to entertain any proceedings after a direct appeal has been taken. Ark. Rules Crim. Pro., Rule 37.2(a) (Repl. 1977).

In petitioner's case, however, the court deviated from this procedure. Unlike the action taken in Woodard and Collins, here the court denied the petition. Additionally, the court did not enter a per curiam order expressly vesting the trial court with jurisdiction to entertain a motion for a supplemental transcript, as it did in the two cited cases. Petitioner is aware of no reason why he was not afforded the same treatment as the petitioners in Collins and Woodard, but the failure to equally provide petitioner with a transcript for preparation of his petition for post-conviction relief denied him the equal protection of the law. Long v. Iowa, supra, and Smith v. Bennett, supra.

Petitioner nevertheless reiterated his request for a transcript of the voir dire proceedings, incorporating it in his petition for post-conviction relief in reliance upon the court's earlier statement in Pickens v. State, supra. Petitioner did point out that the supplemental transcript would be unnecessary if the court reviewed and granted relief due to the inconsistent verdicts, but has never abandoned his assertion that prospective jurors were wrongfully excluded under Witherspoon. The actions of the court on appeal and on petition for post-conviction review denied petitioner the same opportunity for full and meaningful review accorded to the appellant in Clark v. State, supra, and the petitioners in Collins and Woodard.

Finally, petitioner was also denied a meaningful opportunity for review of his assertion that he was denied the effective assistance of counsel. The court denied petitioner permission to proceed on this allegation essentially because there were no specific facts cited to support the allegations of ineffectiveness. The court relied upon the cases of Clark v. State, 255 Ark. 13, 498 S.W.2d 57 (1973) and Leasure v. State, 254 Ark. 961, 487 S.W.2d 1 (1973) which hold that in order to prevail on a claim of ineffectiveness of counsel, one has the burden of demonstrating that the acts or omissions of counsel resulted in making the proceedings a farce and mockery and that he was prejudiced thereby. Petitioner here was denied the opportunity to meet that burden of

proof in an evidentiary hearing.

The Arkansas Supreme Court has repeatedly held that ineffectiveness of counsel cannot be raised for the first time on appeal for the stated reason that a trial court is in a better position to assess the quality of representation after an evidentiary hearing, thereby creating a record in the trial court on that issue which would enable the appellate court "to examine in detail the sufficiency of the representation below." Hillard v. State, 259 Ark. 81, 84, 531 S.W.2d 463 (1976). In fact, in Clark v. State, supra, and Leasure v. State, supra, relied upon by the court as support for the proposition that a petitioner must demonstrate facts to support his allegations of ineffectiveness, the petitioners were granted permission to seek post-conviction relief in the trial court and to develop those facts in support of their allegations. In Clark relief was denied by the trial court after an evidentiary hearing and on appeal from the record made in the trial court, the appellate court affirmed because the evidence presented by the petitioner at that hearing did not establish facts sufficient to constitute ineffective counsel. In Leasure relief was denied by the trial court without holding an evidentiary hearing. On appeal the denial was affirmed, the appellate court emphasizing:

> This order was made by the same circuit judge who tried the case, and who, as a result, occupied the best possible vantage point from which to evaluate the effectiveness of appointed counsel's assistance to appellant from a review of files and records. His perspective is far better than ours, because he is not beset by the same difficulties inherent in retrospective appellate evaluation of a cold and unfamiliar record.

Here petitioner made numerous allegations of ineffectiveness which could only be factually developed by the presentation of evidence at an evidentiary hearing. These allegations could not be adequately evaluated on a cold and unfamiliar record (particularly when there is no full transcript of the trial) but should have at least been presented to the trial judge who occupied the best possible vantage point to evaluate the claims of ineffectiveness. In other cases, the Supreme Court of

Arkansas has recognized that until the facts are completely developed at an evidentiary hearing, it would idle for them to speculate about what rights may have been violated by counsel's actions and what relief might there be proved to be appropriate. Lewis v. State, 265 Ark. 132, 577 S.W.2d 415 (1979). In fact, under similar allegations of ineffectiveness as here, the petitioner in Neal v. State, 270 Ark. 442, ___ S.W.2d ___ (September 29, 1980) was granted permission to develop his allegations of ineffectivenss in the trial court.

That opportunity was arbitrarily denied petitioner and there is no rational basis for the different treatment afforded petitioner than was afforded the petitioners in Clark, Leasure, Lewis, and Neal, to name but a few cases. The circuity of the court's reasoning and arbitrariness of its refusal to consider the allegations of error is best exemplified by the court's finding counsel was not ineffective in failing to raise the issue of the jury's inconsistent findings on appeal. That conclusion was based upon the court's failure to find constitutional error in the inconsistent verdicts. Yet, the absence of a finding of constitutional error was due to the court's declining to review that issue since it was not raised by counsel at trial or on appeal. In effect, the court avoided consideration of the issue of inconsistent verdicts because of the omissions of counsel, and by bootstrapping the two issues, also avoided the issue of ineffective counsel.

The inconsistent use of newly adopted procedural rules to bar review in this case of petitioner's assertion of constitutional errors denied the petitioner any genuine opportunity or adequate corrective process for the hearing and determination of his claims of violations of constitutional rights. The court's insensitivity to the allegations of constitutional error poses a greater concern than the suggestion of Justices Marshall and Brennan that appellate courts are incapable of guaranteeing the objective and evenhanded review contemplated and hoped for in Gregg. The court's inaction here reflects not only an inabilty

of the court to take its appellate review responsibilities seriously, but an actual avoidance of those review responsibilities. The spector of an appellate court allowing the execution of a human being, in the presence of constitutional error on the face of the record, simply because of the ineffectiveness of counsel in failing to raise the issue on appeal and the court's failure to adequately review the entire record on appeal as mandated, coupled with the refusal to even consider other constitutional claims or allow them to be developed in the trial court, is alarming and dispels any motion of meaningful appellate review or even the opportunity therefor.

CONCLUSION

For the reasons set forth, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Arkansas.

E. ALVIN SCHAY
APPELLATE PUBLIC DEFENDER

BY: RAY HARTENSTEIN
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LITTLE ROCK, ARKANSAS 72202

COUNSEL FOR PETITIONER

80-6299

Supreme Court, U.S.
FILED
MAR 3 1981
Alexander L. Stevas, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. A-697

EDWARD CHARLES PICKENS, PETITIONER,

V.

STATE OF ARKANSAS, RESPONDENT.

APPENDIX A

NOT DESIGNATED FOR PUBLICATION.
SEE RULES SUPREME COURT RULE 21.

SUPREME COURT OF ARKANSAS

No. CR 76-186

NOV 3 - 1980

EDWARD CHARLES PICKENS Petitioner	PETITION TO PROCEED UNDER CRIMINAL PROCEDURE RULE 37
v.	
STATE OF ARKANSAS Respondent	PETITION DENIED

PER CURIAM

Petitioner Edward Charles Pickens was found guilty of capital felony murder and was sentenced to death by a jury on February 5, 1976. On June 6, 1977, we affirmed the judgment on appeal. Pickens v. State, 261 Ark. 756, 551 S.W. 2d 212 (1977), cert. denied, 435 U.S. 909 (1978).

On September 2, 1980, petitioner filed a petition for permission to proceed under Arkansas Criminal Procedure Rule 37 for postconviction relief. Since the petition was not filed within 3 years of the date of commitment as required by Rule 37.2(c), the petition is untimely unless the grounds for relief would render the judgment of conviction absolutely void.

Rule 37 affords relief when a sentence was imposed in violation of the Constitution or laws of the United States or this State or "is otherwise subject to collateral attack." The rule does not serve as a substitute for direct appeal or as a method for review of mere error in the conduct of the trial. Neal v. State, 270 Ark___ (September 29, 1980); Hulsey v. State, 268 Ark____, 595 S.W. 2d 934 rehearing denied 599 S.W. 2d 729 (1980); Clark v. State, 255 Ark 13, 498 S.W. 2d 657 (1973). It does not serve as a rehearing on issues that were decided on direct appeal. Neal v. State, supra; Hulsey v. State, supra. It also does not permit matters which might have been raised at trial or on appeal to be the basis for a post-conviction petition unless issues so fundamental as to render the judgment void and open to collateral attack are raised. Neal v. State, supra; Hulsey v. State, supra.

Petitioner was charged with the capital felony murder of Wes Noble during the perpetration of a robbery. Petitioner alleges that although he was found guilty as charged, the jury during sentencing did not find that the murder had been committed for pecuniary gain. He contends that without element of pecuniary gain there was no robbery and, this, no capital felony murder under Bly v. State, 263 Ark. 138, 562 S.W. 2d 605 (1978). He asks for a new trial or a reduction in sentence to the minimum punishment for first degree murder.

No objection was made at rial when the allegedly inconsistent and ambigvous verdicts were returned, nor was this issue raised in petitioner's motion for a new trial. Moreover, this allegation could have been raised on direct appeal, but was not. Thus, this petition for postconviction relief is not the proper place to raise this matter for the first time. Neal v. State, supra; Hulsey v. State, supra.

Petitioner also alleges ineffective assistance of counsel at both the trial and appellate levels. Counsel is presumed to be competent intil a petitioner demonstrate facts to undermine that assumption and shows that he was prejudiced by that ineffectiveness. Clark v. State, supra. Counsel is ineffective when the "acts or omissions of counsel result in making the proceedings a farce and a mockery of justice, shocking the conscience of the Court, or the representationrepresentation is so patently lacking in competence or adequacy that it becomes the duty of the Court to be aware of and correct it." Leasure v. State, 254 Ark 961, 964, 497 S.W. 2d 1 (1973). However, mere errors, omissions or mistakes, improvident strategy or bad tactics will not justify postconviction relief. Leasure v. State, supra. Petitioner lists nine numbered allegations to demonstrate counsel's ineffectiveness.

First, he alleges trial counsel failed to request individual voir dire of veniremen and sequestration of veniremen during voir dire.

It is alleged that these failures led to a "superficial jury selection process." Petitioner has not supported this conclusory allegation with specific facts nor has he cited any authority to show that these alleged failures were error. We cannot find any prejudice to petitioner.

Petitioner also alleges that counsel failed to make proper inquiry during voir dire on the veniremen's possible bias due to pretrial publicity and on their views on capital punishment. This failure allegedly led to exclusion of jurors in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). This allegation suffers the same defect as the previous one. Petitioner has not presented any facts to demonstrate prejudicial pretrial publicity or improper exclusion of veniremen. He has not shown how the veniremen were improperly excluded or even which ones were improperly excluded. He has made no showing that prejudicial pretrial publicity was present in Prairie County or that any of the veniremen were aware of it.

Petitioner's third allegation attacks counsel's adoption of a co-defendant's pleadings instead of filing motions for individual and sequestered voir dire; to suppress evidence seized from the vehicle in which petitioner was an occupant; to suppress petitioner's confession; for expert witnesses at the penalty phase; to suppressthe line-up identification and for appointment of co-counsel to assist in the trial. The adopted pleadings were motions for a bill of particulars and for a change of venue. The State furnished a 9 page response on the bill of particulars. The trial court granted both petitioner and that co-defendant a change of venue, but to different places. Neither change was to the place requested in the co-defendant's motion. Petitioner has failed to show prejudice in the adoption of the co-defendant's motions.

Regarding the other alleged failures listed above, the failure to file a motion for individual and sequestered voir dire has already been discussed. An in-depth hearing was held before trial at the request of the State on the confession, line-up and seizure of evidence from the car. Since these matters were raised, petitioner was not

prejudiced. Furthermore, on appeal, we found no error in the trial court's ruling on the confession, lineup and seizure. Pickens v. State, supra. Nor did we find error in the admission into evidence of one of the victim's ring and the gun found the next day near where the car had been abandoned. Petitioner has failed to demonstrate why expert witnesses were needed at the penalty phase or even specify in what fields the witnesses should have been experts. We also find the alleged failure to move for appointment of co-counsel to be conclusory. Petitioner has completely failed to present any facts to support these allegations and we cannot speculate on any prejudice.

The fourth allegation of ineffectiveness argues that counsel failed to request a hearing on the motion for change of venue and so denied petitioner the opportunity to demonstrate his inability to receive a fair trial in the Southern District of Prairie County. It is also argued that counsel failed to object to venue being changed to that district. Petitioner has not shown that the people of the Southern District were hostile or biased or that petitioner did not receive a fair trial. Since petitioner has failed to show that he was prejudiced by trial in the Southern District, the failure to request a hearing on change of venue would not rise to the level of demonstrating ineffectiveness.

Fifth, petitioner contends that counsel failed to sufficiently cross-examine the state's witnesses at the pretrial hearing on petitioner's confession. This allegation is without merit. Ineffectiveness is not measured by counsel's success in obtaining a desired ruling. On appeal we found the confession to have been voluntarily given. Pickens v. State, supra. Petitioner has failed to show how he was prejudiced and has even failed to present any facts that allegedly would have been presented by a more vigorous cross-examination.

We also find no merit to petitioner's sixth allegation that counsel failed to cross-examine witnesses, to object to the introduction of photographs and to object to "the introduction of tangible evidence which was not specifically connected to petitioner."

Petitioner has failed to specify which witnesses or what beneficial facts would have been elicited by their cross-examination. He has failed to demonstrate why the photographs were objectionable. We will not speculate on the "tangible evidence." However, we do note that the pretrial hearing involved the bank bags, stereo and the money recovered from the car abandoned in Memphis, one of the victim's rings removed from petitioner's hand as he was being processed after the arrest and the .22 pistol recovered near the scene of the abandoned car. We found no error in their admission into evidence. Pickens v. State, supra.

It is argued in the seventh point that counsel failed to properly argue to the jury at the guilt phase that the evidence did not clearly establish which of the three assailants did the actual shooting. Since the arguments were not included in the record before us, we cannot determine whether counsel did or did not argue that matter. Petitioner points out the jury was properly instructed that he was not the only participant in the crime and it would be an affirmative defense if he did not aid or participate in the homicide. The record shows counsel cross-examined all the relevant witnesses on the identity of the person who had actually fired the shots. Prejudice is not shown by an unfavorable verdict. Neal v. State, supra.

The eighth point contends counsel failed to argue at the sentencing stage of the trial that petitioner had not actually committed the homicide and instead presented absolutely nothing in mitigation. It is alleged that there was available "a plethora of relevant information regarding petitioner's background" which should have been offered as mitigation. Leasure v. State, supra. Moreover, we can readily see why such an omission would have been a deliberate tactic since the information is not favorable.

Petitioner's final allegation of ineffectiveness involves the appeal. The tape recordings of the trial were destroyed by fire and the record had to be reconstructed from the reporter's shorthand notes. Counsel's failure to object to the reconstructed record and

its omission of voir dire when given an opportunity allegedly deprived petitioner of a meaningful appellate review. The burden is on petitioner to show error in the reconstructed record and this burden is not met by showing the possibility of error. Butler v. State, 264 Ark. 242, 520 S.W. 2d 272 (1978). Petitioner has not demonstrated prejudice. Since we have previously found there to be no violation of any fundamental constitutional right, we also find that counsel was not ineffective in failing to raise the allegedly inconsistent findings of the jury on appeal.

We do not find that any of the allegations of ineffective assistance of counsel, considered together or separately, justify vacation of the sentence. Petitioner appears to have been competently represented by counsel and to have received a fair trial. Counsel was not incompetent in failing to achieve success by his strategy and tactics.

Finally, on June 23, 1980, we denied petitioner's petition for writ of certiorari without prejudice to his right to apply to the trial court for a supplemental transcript. He now asks us to clearly specify that the trial court has jurisdiction tc entertain a motion for supplementation of the record. By our June 23rd order, we vested the trial court with the jurisdiction to entertain such a motion. Petitioner apparently chose to proceed with this petition without applying to the trial court or even to us for clarification. Under Rule 37.2(b), all grounds for relief under this Rule must be raised in the original or amended petition and any grounds not so raised may not be the basis for a subsequent petition.

Petition denied.

80-6299

RECEIVED
MAR 7 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. A-697

EDWARD CHARLES PICKENS, PETITIONER,

V.

STATE OF ARKANSAS, RESPONDENT.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, Edward Charles Pickens, who is now held in the Cummins Unit of the Arkansas Department of Correction, asks leave to file the attached petition for a Writ of Certiorari to the Supreme Court of Arkansas without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner's affidavit in support of this motion is attached hereto.

E. ALVIN SCHAY
APPELLATE PUBLIC DEFENDER

BY: Ray Hartenstein
RAY HARTENSTEIN
CHIEF DEPUTY DEFENDER
SUITE 714, 1515 BUILDING
LITTLE ROCK, ARKANSAS 72202

Counsel for Petitioner

80 - 6299

RECEIVED
MAR 7 1981
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IN THE
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OCTOBER TERM, 1980

NO. A-697

EDWARD CHARLES PICKENS, Petitioner,

V.

STATE OF ARKANSAS, Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Edward Charles Pickens, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-captioned case.

2. Because of my poverty I am unable to pay the cost of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in this case.

5. Leave to proceed in forma pauperis was granted in both the trial court and Supreme Court of Arkansas.

6. The nature of this cause is briefly stated as follows:

I was convicted of capital murder and sentenced to death in the Circuit Court of Prairie County, State of Arkansas. The judgment and sentence were apealed to the Supreme Court of Arkansas. The grounds of the appeal were, inter alia, that the sentence of death under the laws of Arkansas violates the Sixth, Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? NO

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. Oct. 1975 $125.00 mo.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

5. List the persons who are dependent upon you for support and state your relationship to those persons. NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Executed on February 23, 1981, at Grady, Arkansas.

Edward Charles Pickens
Edward Charles Pickens

SUBSCRIBED and SWORN to before me this 23 day of February, 1981.

Notary Public

MY COMMISSION EXPIRES:
MY COMMISSION EXPIRES: 10-14-81

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

EDWARD CHARLES PICKENS — PETITIONER

VS. NO. 80-6299

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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ATTORNEYS FOR RESPONDENT

NO. 80-6299

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

EDWARD CHARLES PICKENS — PETITIONER

vs.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

Whether petitioner was denied due process of law by the affirmance of his conviction and sentence of death on the jury's findings with regard to an element of the crime charged.

Whether petitioner was denied equal protection and his right under the Eighth and Fourteenth Amendments to meaningful and responsible review of his conviction and sentence.

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OPINIONS BELOW

The opinion of the Arkansas Supreme Court affirming petitioner's conviction is found at 261 Ark. 756, 551 S.W.2d 212 (1977). The opinion of the Supreme Court of Arkansas denying petitioner's petition for post conviction relief was unpublished and thus is an unreported opinion. A copy of the opinion appears in Appendix B. A copy of the opinion affirming petitioner's conviction appears in Appendix A.

JURISDICTION

The petitioner has adequately set forth the grounds for jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The petitioner has adequately set forth the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

The petitioner has adequately set forth the facts of the case.

REASONS FOR DENYING THE WRIT.

1. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY THE AFFIRMANCE OF HIS CONVICTION AND SENTENCE OF DEATH AS THE JURY DID NOT MAKE INCONSISTENT FINDINGS WITH REGARD TO AN ESSENTIAL ELEMENT OF THE CRIME CHARGED.

Petitioner contends that he was denied due process of law by the affirmance of his conviction and sentence of death alleging that the jury made totally inconsistent findings with regard to an essential element of the crime charged. Specifically, petitioner submits that the jury's special finding that the murder was not committed for pecuniary gain is inconsistent with its general verdict of guilt of the crime charged and negates an essential element of the crime which the jury had to find beyond a reasonable doubt. See Petition at 11.

Respondent would submit that the jury's finding that the murder was not committed for pecuniary gain is not inconsistent with its general verdict of guilt of the crime charged.

Petitioner Edward Charles Pickens was charged by information with capital felony murder in violation of Ark. Stat. Ann. §41-7402(A) (Supp. 1973), the information alleging that petitioner did murder one Wesley Noble during the perpetration of a robbery. (T. 27, 28) After deliberation, the jury found petitioner guilty of capital murder as charged in the information. (T. 42)

The jury was then instructed with regard to sentencing and that its findings on aggravating circumstances must be unanimous and beyond a reasonable doubt. After further deliberation, the jury returned with its designated findings of fact. The jury found three of the aggravating circumstances to exist beyond a reasonable doubt: (1) the defendant beyond a reasonable doubt had previously been convicted of a felony involving the use or threat of violence; (2) the defendant beyond a reasonable doubt created a great risk of death to one or more persons in addition to the victim; and (3) the capital felony murder was beyond a reasonable doubt committed for the purpose of avoiding a lawful arrest. The jury concluded that the capital felony murder was not committed for pecuniary gain. (T. 43, 44)

Petitioner now contends that the jury's finding that the capital felony murder was not committed for pecuniary gain is inconsistent with his conviction for capital felony murder during the perpetration of a robbery.

Respondent would submit that the facts clearly show that the murder of Wesley Noble was to prevent him from identifying petitioner and not for pecuniary gain. As the opinion of the Arkansas Supreme Court reveals (Appendix A), petitioner's own testimony substantiates the above position, to-wit:

> Cloud's Grocery store at Casscoe, Arkansas was held up by three Negro men wielding a sawed-off shot gun and a .22 pistol. After raping the female clerk, the holdup men caused the woman, the store's owner and seven of the customers, all of whom had been robbed, to lie on the floor with their faces down. While in that position, seven people were shot by a .22 pistol. The .22 pistol was reloaded and fired a second time into several of the victims. Harold Goacher described the holdup men as being two dark Negro men and a light colored one. It was Goacher's testimony that the two dark Negro men took turns in firing the .22 pistol. Appellant Edward Charles Pickens, a/k/a Larry Coakley, an ex-convict from the State of Michigan, admits that he was present when the shooting occurred but insists that the light colored Negro man was the one who shot the victims in order to prevent the victims from identifying the holdup men. Some, but not all of the victims survived. The jury found appellant guilty of Capital Felony Murder of Wes Nobles, one of the Negro customers at the grocery store. (Emphasis added)

Pickens v. State, 261 Ark. at 757.

Petitioner relies on Bly v. State, 263 Ark. 138, 562 S.W.2d 605 (1978) for the proposition that "absent proof that a robbery was attempted or committed, petitioner's conviction of capital murder cannot stand." See Petition at 10. Respondent would submit that Bly is distinguishable from the facts herein.

In Bly, the facts revealed that the victim, Burns, was killed following a dispute over whether he should have contributed $2.00 of $4.00 for gasoline that Bly had paid for while they were driving around with another friend named Tumbleson. In reviewing the evidence, the Arkansas Supreme Court observed that:

> The evidence in this case certainly cannot be characterized as substantial evidence that Bly committed a robbery. Even if we concede there

is room for argument on this issue, when we consider the jury's findings as to aggravation and mitigation, we are convinced that the conviction cannot stand. The jury found:

> (1) That the murder was committed by someone other than Bly [which could only be Tumbleson.]
>
> (2) That the murder was not committed for pecuniary gain.
>
> (3) That the murder was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

All of these findings are inconsistent with the finding that Bly was guilty of capital murder as charged. If Bly did not kill Burns, if it was not done for pecuniary gain, and, if it was not done to prevent a lawful arrest -- that is to prevent discovery of the robbery -- then it would not be a murder committed while engaged in the prepetration of a robbery as charged.

Considered as a whole, the question of whether there even was a robbery, the obvious remoteness of the "robbery" from the killing, and the inconsistent findings by the jury in determining the sentence, require us to reverse the case.

Bly v. State, 263 Ark. at 141.

In the instant case, there is no dispute as to whether there was a robbery. On the contrary, petitioner's own testimony at trial established that he took part in the robbery. The only issue is whether the fact that the killings took place after the consummation of the robbery, justifying the jury's finding that the murders were for the purpose of avoiding identification and arrest rather than pecuniary gain, vitiated the underlying felony of robbery.

In this regard, respondent would submit that any pecuniary gain had already been reaped, thus satisfying the robbery requirement, and that the purposes of the killings were to prevent identification and arrest as the jury properly found. State v. Holton, 197 Neb. 544, 250 N.W.2d 876 (1977), cert. denied, 434 U.S. 912 (1977).

Hence, petitioner's allegation in this regard is without merit.

2. PETITIONER WAS NOT DENIED EQUAL PROTECTION AND HIS RIGHT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO MEANINGFUL AND RESPONSIBLE REVIEW OF HIS CONVICTION AND SENTENCE.

Petitioner contends that the Arkansas Supreme Court's failure to review constitutional error in the record denied him equal protection and his right under the Eighth and Fourteenth Amendments to meaningful and responsible review of his conviction and sentence to ensure that the sentence is not arbitrarily or capriciously imposed. See Petition at 14.

Specifically, petitioner first submits that he was denied meaningful appellate review of his contention that the inconsistent verdicts discussed above rendered his conviction void. The Arkansas Supreme Court found this contention not properly raised for the first time in a petition for post conviction relief as it was not 1) preserved by an objection at trial, 2) raised on direct appeal or 3) raised in petitioner's motion for a new trial.

Furthermore, as discussed above, petitioner's contention is without merit and would not render his conviction void. It was, therefore, not properly raised in a petition for post conviction relief under Ark. R. Crim. Proc., 37.1(a) Ark. Stat. Ann. Vol. 4A at 523 (Repl. 1977).

Secondly, petitioner contends that he was denied a meaningful opportunity to be heard on his contention that prospective jurors were improperly excluded under the Witherspoon rule. The absence of a meaningful opportunity, as explained by petitioner, was the result of the Arkansas Supreme Court's failure to order a transcript of the voir dire proceedings. This failure, however, was on petitioner's part as evidenced by the following excerpt from the Per Curiam order (Appendix B) denying his post conviction petition, to-wit:

> "Finally, on June 23, 1980, we denied petitioner's petition for writ of certiorari without prejudice to his right to apply to the trial court for a supplemental transcript. He now asks us to clearly specify that the trial court has jurisdiction to entertain a motion for supplementation of the record. By our June 23rd order, we vested the trial court with the jurisdiction to entertain such a motion. Petitioner apparently chose to proceed with this petition without applying to the trial court or even to us for clarification. Under Rule 37.2(b), all grounds for relief under this Rule must be raised in the original or amended petition and any grounds not so raised may not be the basis for a subsequent petition."

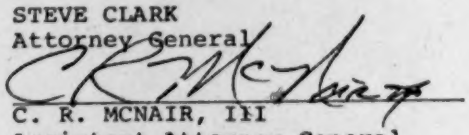
Lastly, petitioner alleges that he was also denied a meaningful opportunity for review of his assertion that he was denied the effective assistance of counsel. See Petition at 22. This allegation, however, is also unsupported by the Per Curiam order (Appendix B) denying petitioner's request for post conviction review. That order clearly shows that the Arkansas Supreme Court considered and disposed of all nine allegations of counsel's ineffectiveness before denying the petition for post conviction relief on that issue. Hence, respondent submits that petitioner was not denied a meaningful opportunity for review of that assertion.

CONCLUSION

For the reasons set forth, a writ of certiorari to review the judgment and opinion of the Supreme Court of Arkansas should be denied,

Respectfully submitted,

STEVE CLARK
Attorney General

By: 

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APPENDIX A

Edward Charles PICKENS a/k/a Larry COAKLEY *v.* STATE of Arkansas

CR 76-186 551 S.W. 2d 212

Opinion delivered June 6, 1977
(In Banc)

1. PROSECUTING ATTORNEYS — SPECIAL COUNSEL, RIGHT TO REQUEST — DEPUTY ATTORNEYS GENERAL AS SPECIAL PROSECUTORS. — It is permissible for the prosecuting attorney to request the assistance of special counsel in the prosecution of a criminal case, and it was not error for the trial court to allow deputy attorneys general to act as special prosecutors.
2. VENUE — REQUEST FOR CHANGE OF VENUE — FAILURE TO OBJECT TO VENUE FIXED BY COURT. — Where appellant did not object after the court granted his request for change of venue but specified a different district, he cannot contend on appeal that the trial was held in an improper place.
3. TRIAL — MOTION FOR NEW TRIAL — TRANSCRIPT OF RECORD, SUFFICIENCY OF. — Appellant's motion for new trial on the grounds that a complete transcript could not be made since the court reporter's tape recordings of the trial were destroyed by fire was properly overruled where the court found that the transcript prepared from the reporter's shorthand notes was true and accurate, and defendant was given an opportunity to offer any corrections or additions but did not do so.
4. CRIMINAL LAW — RIGHT TO COUNSEL — WAIVER. — Where the totality of the evidence shows that appellant was fully informed of his rights but voluntarily waived his right to counsel, there is no merit to his contention that he was denied that right.
5. APPEAL & ERROR — FAILURE TO OBJECT AT TRIAL — EFFECT. — The Supreme Court does not consider issues raised for the first time on appeal.
6. CRIMINAL LAW — SEARCH OF ABANDONED VEHICLE — EVIDENCE SEIZED ADMISSIBLE. — A search warrant is not required before the police can search an abandoned vehicle from which a defendant flees to prevent apprehension by the police.
7. CRIMINAL LAW — SEARCH, CUSTODIAL — EVIDENCE SEIZED ADMISSIBLE. — A ring taken by appellant from a rape victim and removed from appellant's finger during a custodial search at the jail where he was incarcerated is admissible in evidence.
8. CRIMINAL LAW — MURDER WEAPON — ADMISSIBILITY. — Where a gun used in a robbery-murder was found on the street near where the appellant, who admittedly had handled the gun, was apprehended, it was not obtained as a result of an illegal search

and was admissible in evidence.

9. CRIMINAL LAW — PUNISHMENT, DEATH BY ELECTROCUTION AS — CONSTITUTIONALITY. — Carrying out the sentence of death by electrocution for the crime of capital felony murder under Arkansas law does not violate the Eighth or Fourteenth Amendment to the Constitution of the United States.

10. CRIMINAL LAW — CAPITAL FELONY MURDER — AGGRAVATING & MITIGATING CIRCUMSTANCES, EFFECT OF. — In a conviction for capital felony murder where the jury found four aggravating circumstances and no mitigating circumstances, there is no basis to hold that the sentence of death was wantonly or freakishly imposed.

Appeal from Prairie Circuit Court, *William M. Lee*, Judge; affirmed.

Willis Plant, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Jackson Jones* and *Robert A. Newcomb*, Asst. Attys. Gen., for appellee.

CONLEY BYRD, Justice. Cloud's Grocery store at Casscoe, Arkansas was held up by three Negro men wielding a sawed-off shot gun and a .22 pistol. After raping the female clerk, the holdup men caused the woman, the store's owner and seven of the customers, all of whom had been robbed, to lie on the floor with their faces down. While in that position, seven people were shot by a .22 pistol. The .22 pistol was reloaded and fired a second time into several of the victims. Harold Goacher described the holdup men as being two dark Negro men and a light colored one. It was Goacher's testimony that the two dark Negro men took turns in firing the .22 pistol. Appellant Edward Charles Pickens, a/k/a Larry Coakley, an ex-convict from the State of Michigan, admits that he was present when the shooting occurred but insists that the light colored Negro man was the one who shot the victims in order to prevent the victims from identifying the holdup men. Some, but not all of the victims survived. The jury found appellant guilty of Capital Felony Murder of Wes Nobles, one of the Negro customers at the grocery store. After hearing additional testimony in a bifurcated trial the jury returned a verdict fixing appellant's punishment at death by electrocution. For reversal, appellant raises the issues hereinafter discussed.

POINT I. We find no merit to appellant's contention that it was error for the trial court to allow two Deputy Attorneys General to act as special prosecutors. This Court has long recognized that it is permissible for the prosecuting attorney to request the assistance of special counsel in the prosecution of a criminal case; *Coon* v. *State*, 109 Ark. 346, 160 S.W. 226 (1913). No abuse of the trial court's discretion is shown in the case before us.

POINT II. The record shows that appellant moved to adopt the pretrial pleadings and motions filed on behalf of Sherwood Vincent Gooch. The trial court permitted appellant to adopt Gooch's motion but in doing so specifically provided that the change of venue in appellant's case would be to the Southern District of Prairie County rather than to the Northern District in Gooch's case. Appellant did not thereafter object to the venue and cannot now contend that the trial was held in an improper place.

POINT III. After the trial but before the transcript of the testimony was prepared, the home of the official court reporter was destroyed by fire. Appellant at that time moved for a new trial on the basis that the tape recordings made by the court reporter during the course of the proceedings were destroyed and consequently, the court reporter could not necessarily make a full, complete, exact and accurate transcription of the record at trial. Appellant's motion recognized, however, that the court reporter still had her shorthand notes. The trial court, in overruling appellant's motion, made the following finding, to-wit:

> ". . . That from the reporter's shorthand record of the trial proceeding the court reporter has prepared a true and accurate transcription of the trial proceeding herein and certified same in the usual manner and a copy thereof has been filed with the Circuit Court Clerk at DeValls Bluff, Arkansas and also a copy of same has been delivered to the attorney for the defendant on September 7, 1976. That defendant's attorney was advised that if he could show the Court within twelve days wherein any material mistake or objection was made and/or omitted, the transcript would be corrected ac-

cordingly. There has been no such mistake or omission presented to the Court."

On the basis of the trial court's finding, we must conclude that the motion for new trial was properly overruled. We note that in some instances there are some omissions of isolated words in the transcript, however, appellant does not contend that the transcript before the Court omits any matters of consequence.

POINT IV. Appellant contends that he was denied his Sixth Amendment right to counsel at two critical stages of the prosecution which also had the effect of vitiating his Fifth Amendment rights. These contentions have no merit. The totality of the evidence shows that appellant voluntarily waived his right to counsel and signed a confession after he was fully informed of his rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The record also shows that appellant voluntarily waived his right to counsel in the line-up identification conducted after his arrest by the Memphis, Tennessee Police.

For the first time on appeal appellant contends that the signing of the rights waiver by appellant did not appear in the response to the Bill of Particulars filed by the State. In making the suggestion, appellant does not intimate that he was in any manner prejudiced by the State's alleged failure. Furthermore, the Bill of Particulars Item 1(29) lists "Line-up rights form" as having been furnished to the attorney for appellant. See also Item 4(1) of the Bill of Particulars which refers to a waiver of rights form. Also we do not consider issues raised for the first time on appeal.

POINT V. Appellant contends that the evidence found in the stolen automobile that he and his confederates abandoned in Memphis shortly before their apprehension should have been suppressed because the police did not secure a search warrant. We do not understand the law to require a search warrant before the police can search an abandoned vehicle from which a defendant flees to prevent apprehension by the police. See J. Varon, *Searches, Seizures and Immunities*, Chapter III, § 3 at 183 (2d Ed. 1974).

Neither do we find any merit to appellant's contention that the diamond wedding band taken from the rape victim during the holdup should be suppressed. See *United States* v. *Edwards*, 415 U.S. 800, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974). The record shows that the ring was removed from appellant's little finger during a custodial search at the jail in Memphis after his arrest.

The .22 pistol was found by an alert citizen on the streets of Memphis near the point of appellant's apprehension by the officers. Appellant is not in a position to claim an illegal search.

Appellant under this point also suggests that there was no direct link established between him and the gun found by the Memphis citizen. The record shows that Captain McDonald, a ballistics expert, identified the bullet found in Wes Nobles, the decedent, as having been fired from the recovered .22 pistol. Furthermore, appellant admits that he handled the .22 pistol that was fired into the robbery victims. Consequently, this contention has no merit.

POINT VI. Finally appellant contends that the imposition and carrying out of the sentence of death by electrocution for the crime of Capital Felony Murder under the law of Arkansas violates the Eighth or Fourteenth Amendment to the Constitution of the United States. We find no merit to the contentions made. See *Collins* v. *State*, 261 Ark. 195, 548 S.W. 2d 106 (1977), *Neal* v. *State*, 261 Ark. 336, 548 S.W. 2d 135 (1977), *Giles* v. *State*, 261 Ark. 413, 549 S.W. 2d 479 (1977), *Gregg* v. *Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), *Proffitt* v. *Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976) and *Jurek* v. *Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976).

In making its findings on aggravating and mitigating circumstances the jury made the following specific findings:

> "The Defendant was, beyond a reasonable doubt, previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The Defendant did, beyond a reasonable doubt, in the commission of the capital felony, knowingly create a great risk of death to one (1) or more persons in addition to the victim.

The capital felony was, beyond a reasonable doubt, committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The capital felony was not committed by another person and the Defendant was not an accomplice or his participation relatively minor."

There is substantial evidence to support the jury's findings on each of the above facts and in the absence of any mitigating circumstances, we can find no basis in the record to hold that the sentence of death was wantonly or freakishly imposed against appellant. Like *Neal* v. *State, supra*, this is just another example of a robber who makes the cold-blooded calculation that by annihilating his victim he thereby eradicates an eyewitness to his crime. Society has every right to display an indignant and moral outrage at such offensive conduct and no court should hold that a jury cannot respond to such a grievous affront to humanity by invoking the death penalty in accordance with the laws of the State.

A search of the record shows no other objection made by appellant in the trial court that is worthy of comment.

Affirmed.

GEORGE ROSE SMITH, HOLT and HICKMAN, JJ., concur in the result but adhere to the views expressed in *Collins* v. *State*, 261 Ark. 195 (1977).

APPENDIX B

NOT DESIGNATED FOR PUBLICATION.
SEE REVISED SUPREME COURT RULE 21.

SUPREME COURT OF ARKANSAS

No. CR 76-186

NOV 3 - 1980

EDWARD CHARLES PICKENS Petitioner	PETITION TO PROCEED UNDER CRIMINAL PROCEDURE RULE 37
v.	
STATE OF ARKANSAS Respondent	PETITION DENIED

PER CURIAM

Petitioner Edward Charles Pickens was found guilty of capital felony murder and was sentenced to death by a jury on February 5, 1976. On June 6, 1977, we affirmed the judgment on appeal. Pickens v. State, 261 Ark. 756, 551 S.W. 2d 212 (1977), cert. denied, 435 U.S. 909 (1978).

On September 2, 1980, petitioner filed a petition for permission to proceed under Arkansas Criminal Procedure Rule 37 for postconviction relief. Since the petition was not filed within 3 years of the date of commitment as required by Rule 37.2(c), the petition is untimely unless the grounds for relief would render the judgment of conviction absolutely void.

Rule 37 affords relief when a sentence was imposed in violation of the Constitution or laws of the United States or this State or "is otherwise subject to collateral attack." The rule does not serve as a substitute for direct appeal or as a method for review of mere error in the conduct of the trial. Neal v. State, 270 Ark____ (September 29, 1980); Hulsey v. State, 268 Ark_____, 595 S.W. 2d 934 rehearing denied 599 S.W. 2d 729 (1980); Clark v. State, 255 Ark 13, 498 S.W. 2d 657 (1973). It does not serve as a rehearing on issues that were decided on direct appeal. Neal v. State, supra; Hulsey v. State, supra. It also does not permit matters which might have been raised at trial or on appeal to be the basis for a post-conviction petition unless issues so fundamental as to render the judgment void and open to collateral attack are raised. Neal v. State, supra; Hulsey v. State, supra.

Petitioner was charged with the capital felony murder of Wes Noble during the perpetration of a robbery. Petitioner alleges that although he was found guilty as charged, the jury during sentencing did not find that the murder had been committed for pecuniary gain. He contends that without the element of pecuniary gain there was no robbery and, thus, no capital felony murder under Bly v. State, 263 Ark. 138, 562 S.W. 2d 605 (1978). He asks for a new trial or a reduction in sentence to the minimum punishmen for first degree murder.

No objection was made at trial when the allegedly inconsistent and ambiguous verdicts were returned, nor was this issue raised in petitioner's motion for a new trial. Moreover, this allegation could have been raised on direct appeal, but was not. Thus, this petition for postconvictfon relief is not the proper place to raise this matter for the first time. Neal v. State, supra; Hulsey v. State, supra.

Petitioner also alleges ineffective assistance of counsel at both the trial and appellate levels. Counsel is presumed to be competent until a petitioner demonstrates facts to undermine that assumption and shows that he was prejudiced by that ineffectiveness. Clark v. State, supra. Counsel is ineffective when the "acts or omissions of counsel result in making the proceedings a farce and a mockery of justice, shocking the conscience of the Court, or the representation is so patently lacking in competence or adequacy that is becomes the duty of the Court to be aware of and correct it." Leasure v. State, 254 Ark 961. 964, 497 S.W. 2d 1 (1973). However, mere errors, omissions or mistakes, improvident strategy or bad tactics will not justify postconviction relief. Leasure v. State, supra. Petitioner lists nine numbered allegations to demonstrate counsel's ineffectiveness.

First, he alleges trial counsel failed to request individual voir dire of veniremen and sequestration of veniremen during voir dire.

It is alleged that these failures led to a "superficial jury selection process." Petitioner has not supported this conclusory allegation with specific facts nor has he cited any authority to show that these alleged failures were error. We cannot find any prejudice to petitioner.

Petitioner also alleges that counsel failed to make proper inquiry during voir dire on the veniremen's possible bias due to pretrial publicity and on their views on capital punishment. This failure allegedly led to exclusion of jurors in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). This allegation suffers the same defect as the previous one. Petitioner has not presented any facts to demonstrate prejudicial pretrial publicity or improper exclusion of veniremen. He has not shown how the veniremen were improperly excluded or even which ones were improperly excluded. He has made no showing that prejudicial pretrial publicity was present in Prairie County or that any of the veniremen were aware of it.

Petitioner's third allegation attacks counsel's adoption of a co-defendant's pleadings instead of filing motions for individual and sequestered voir dire; to suppress evidence seized from the vehicle in which petitioner was an occupant; to suppress petitioner's confession; for expert witnesses at the penalty phase; to suppressthe line-up identification and for appointment of co-counsel to assist in the trial. The adopted pleadings were motions for a bill of particulars and for a change of venue. The State furnished a 9 page response on the bill of particulars. The trial court granted both petitioner and that co-defendant a change of venue, but to different places. Neither change was to the place requested in the co-defendant's motion. Petitioner has failed to show prejudice in the adoption of the co-defendant's motions.

Regarding the other alleged failures listed above, the failure to file a motion for individual and sequestered voir dire has already been discussed. An in-depth hearing was held before trial at the request of the State on the confession, line-up and seizure of evidence from the car. Since these matters were raised, petitioner was not

prejudiced. Furthermore, on appeal, we found no error in the trial court's ruling on the confession, lineup and seizure. Pickens v. State, supra. Nor did we find error in the admission into evidence of one of the victim's rings and the gun found the next day near where the car had been abandoned. Petitioner has failed to demonstrate why expert witnesses were needed at the penalty phase or even specify in what fields the witnesses should have been experts. We also find the alleged failure to move for appointment of co-counsel to be conclus Petitioner has completely failed to present any facts to support these allegations and we cannot speculate on any prejudice.

The fourth allegation of ineffectiveness argues that counsel failed to request a hearing on the motion for change of venue and so denied petitioner the opportunity to demonstrate his inability to receive a fair trial in the Southern District of Prairie County. It is also argued that counsel failed to object to venue being changed to that district. Petitioner has not shown that the people of the Southern District were hostile or biased or that petitioner did not receive a fair trial. Since petitioner has failed to show that he was prejudiced by trial in the Southern District, the failure to request a hearing on change of venue would not rise to the level of demonstrating ineffectiveness.

Fifth, petitioner contends that counsel failed to sufficiently cross-examine the state's witnesses at the pretrial hearing on petition confession. This allegation is without merit. Ineffectiveness is not measured by counsel's success in obtaining a desired ruling. On appeal we found the confession to have been voluntarily given. Pickens v. State, supra. Petitioner has failed to show how he was prejudiced and has even failed to present any facts that allegedly would have been presented by a more vigorous cross-examination.

We also find no merit to petitioner's sixth allegation that counsel failed to cross-examine witnesses, to object to the introductio of photographs and to object to "the introduction of tangible evidence which was not specifically connected to petitioner."

Petitioner has failed to specify which witnesses or what beneficial facts would have been elicited by their cross-examination. He has failed to demonstrate why the photographs were objectionable. We will not speculate on the "tangible evidence." However, we do note that the pretrial hearing involved the bank bags, stereo and the money recovered from the car abandoned in Memphis, one of the victim's rings removed from petitioner's hand as he was being processed after the arrest and the .22 pistol recovered near the scene of the abandoned car. We found no error in their admission into evidence. Pickens v. State, supra.

It is argued in the seventh point that counsel failed to properly argue to the jury at the guilt phase that the evidence did not clearly establish which of the three assailants did the actual shooting. Since the arguments were not included in the record before us, we cannot determine whether counsel did or did not argue that matter. Petitioner points out the jury was properly instructed that he was not the only participant in the crime and it would be an affirmative defense if he did not aid or participate in the homicide. The record shows counsel cross-examined all the relevant witnesses on the identity of the person who had actually fired the shots. Prejudice is not shown by an unfavorable verdict. Neal v. State, supra.

The eighth point contends counsel failed to argue at the sentencing stage of the trial that petitioner had not actually committed the homicide and instead presented absolutely nothing in mitigation. It is alleged that there was available "a plethora of relevant information regarding petitioner's background" which should have been offered as mitigation. Leasure v. State, supra. Moreover, we can readily see why such an omission would have been a deliberate tactic since the information is not favorable.

Petitioner's final allegation of ineffectiveness involves the appeal. The tape recordings of the trial were destroyed by fire and the record had to be reconstructed from the reporter's shorthand notes. Counsel's failure to object to the reconstructed record and

its omission of voir dire when given an opportunity allegedly deprived petitioner of a meaningful appellate review. The burden is on petitioner to show error in the reconstructed record and this burden is not met by showing the possibility of error. Butler v. State, 264 Ark. 242, 520 S.W. 2d 272 (1978). Petitioner has not demonstrated prejudice. Since we have previously found there to be no violation of any fundamental constitutional right, we also find that counsel was not ineffective in failing to raise the allegedly inconsistent findings of the jury on appeal.

We do not find that any of the allegations of ineffective assistance of counsel, considered together or separately, justify vacation of the sentence. Petitioner appears to have been competently represented by counsel and to have received a fair trial. Counsel was not incompetent in failing to achieve success by his strategy and tactics.

Finally, on June 23, 1980, we denied petitioner's petition for writ of certiorari without prejudice to his right to apply to the trial court for a supplemental transcript. He now asks us to clearly specify that the trial court has jurisdiction to entertain a motion for supplementation of the record. By our June 23rd order, we vested the trial court with the jurisdiction to entertain such a motion. Petitioner apparently chose to proceed with this petition without applying to the trial court or even to us for clarification. Under Rule 37.2(b), all grounds for relief under this Rule must be raised in the original or amended petition and any grounds not so raised may not be the basis for a subsequent petition.

Petition denied.